Federal Trade Commission

PRICE SURVEYS, BENCHMARKING AND INFORMATION EXCHANGES

Remarks of

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The views expressed are those of the Commissioner and do not necessarily reflect those of the Federal Trade Commission or any other commissioner.

Good morning. I am happy to be here today to talk about the antitrust risks of price surveys, benchmarking and information exchanges from my perspective as a commissioner at the Federal Trade Commission. The topic is an important one, and this type of meeting itself provides a forum for the dissemination of useful information for this association. At the Federal Trade Commission, we do our best to eradicate deception, so before I go any further, I will give our traditional disclaimer: I speak only for myself, not for the Commission or for any other commissioner.

Today is election day. Talk about an exchange of information. This has to be one of the most impressive of all information exchanges. One of the concerns that always attends information exchanges is the accuracy of the information. The election process surely would get high marks on this count as an accurate reflection of the preferences of those who turn out to vote. As for the power of information, I cannot think of a better example to demonstrate that power than the transmission of the views of the electorate through the election process. The democratic process at work is perhaps the most grand of all information exchanges. To top it off, I cannot think of a single antitrust problem that stems from this joint communication of voter opinion through the voting process. It takes my breath away!

But going back to trade associations, as you well know, trade associations perform a number of functions that are useful to their members and to society generally, and the exchange of

information is one of the most important of those functions. Associations collect information from and disseminate information to members, consumers and government. Among the useful functions that associations perform is providing information to the public, such as advertisements placed by dental associations about the importance of brushing your teeth and getting regular dental check-ups, and through other informational services, such as referral services run by local bar associations that provide the names of available practitioners to those in search of a lawyer.

Associations provide information by publishing newsletters, periodicals and industry statistics, and also arrange educational functions. Indeed, this seminar today is a form of information exchange. In addition to the industry statistics that associations traditionally collect, associations monitor and report on the activities of governments, suppliers, customers and others. Associations often play an important role in the formulation of legislation, regulations or other government policy by providing information to government decisionmakers.

Most of these information sharing activities do not present risks to competition and, indeed, provide substantial benefits. But certainly I am preaching to the converted, for the central purpose of trade associations is to transfer information. If all this is true, and trade association information exchanges are so beneficial, why are we talking about trade associations, information exchanges and restraints of trade?

Members of trade associations are, for the most part, competitors who have common business interests, and an agreement among them on a common course of action has the potential to restrain trade. Indeed, some trade associations have been formed for the very purpose of fixing prices. Two of the earliest cases brought under the Sherman Act back in the late nineteenth century involved trade associations of competing railroads that maintained, in their own defense, that an agreement on price was necessary to prevent "deadly"[1] and "ruinous"[2] competition among their members. These cases are fascinating to read from today's vantage point. The Supreme Court concluded in both cases that price fixing was barred by the Sherman Act, even when the price fixed assertedly was reasonable.[3]

Before going any further, it may be useful to define the activities we are talking about today: price surveys, information exchanges and benchmarking. Information exchanges are the broadest category and encompass the other two. In the antitrust world, an information exchange is simply two or more competitors trading facts relevant to competitive decisions. Those of us who practice antitrust law tend to think of pricing

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[1] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 333 (1897).

[2] United States v. Joint Traffic Ass'n, 171 U.S. 505, 576 (1898).

[3] "The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted." Trans-Missouri Freight, 166 U.S. at 339.

information when we think of information exchange, but production, inventories, shipments and capacity data also may be the subject of exchange. Information exchanges may occur under the auspices of a trade association or outside it.

Price surveys and benchmarking are forms of information exchange. Price surveys have been around for a long time, presumably because they are useful. As I will discuss later, some early antitrust cases stemmed from price surveys conducted by trade associations. Consumer or other organizations also compile price surveys. The Washington Post, for example, regularly reports a list of stores having the best prices for various products, as compiled by a consumer organization.

Information about prices helps businesses make informed decisions about the prices at which they will offer their products and services, eliminating the need for a more costly trial and error process. Price information is useful to both consumers and businesses to inform their buying decisions. But price is the most sensitive competitive variable -- the "central nervous system" of our competitive economy, the Supreme Court has said[4] -- and so price surveys must be carefully managed to avoid the implication of tampering with price.

Benchmarking is the new kid on the block. Benchmarking refers to the practice of evaluating another company's ideas, practices or methods and, if possible, transferring them to one's

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[4] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

own business to operate more efficiently. According to an article in Business Week, for example, L.L. Bean's mail order shipping process was so highly regarded that Bean hosted 35 benchmarking visits in 1991. In 1992, requests for visits were pouring in at the rate of five a week, and Bean found it necessary to restrict the number of visits.[5]

For my purposes today, I will define benchmarking as the practice of examining some aspect of the business of another firm as a reference point against which to evaluate and improve one's own capabilities. The goals of benchmarking -- to learn more efficient modes of production or distribution or management, for example -- have obvious procompetitive potential, and the practice can lead to improved quality of products and services and lower prices for consumers.[6] On the other hand, benchmarking has the potential to facilitate anticompetitive communications among competitors or perhaps to provide a focal point for collusion.

Many other types of information may be gathered and disseminated by trade associations. Production data, capacity information, employment figures and wages and employee benefits, industry advertising practices, product standards and codes of ethics are among the topics in which trade associations and their members will be interested. I understand that Deborah Owen, a

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[5] Port & Smith, "Beg, Borrow -- and Benchmark," Business Week, Feb. 30, 1992, at 74.

[6] See Henry, "Benchmarking and Antitrust," 62 Antitrust L.J. 483 (1994).

former colleague of mine at the Commission, will speak later today about standards setting, and I will leave that subject to her.

What are the antitrust risks? The overall risk of information sharing among competitors is that the activity may foster an agreement in restraint of trade. The most obvious risk is price fixing, and most of the cases involve allegations of price fixing or conduct closely related to price. I would like to spend some time exploring the background of the law in this area, because I think that is one of the best ways to give you a general sense of how we approach these issues.

Information exchanges of all kinds are analyzed under Section 1 of the Sherman Act, which prohibits contract, combinations or conspiracies in restraint of trade,[7] and Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition.[8] The principle that "unfair methods of competition" as used in the FTC Act include restraints of trade violative of the Sherman Act was established in cases involving trade associations.[9] Section 5 of the FTC Act also may reach conduct that threatens to restrain competition but does not rise to a violation of the Sherman Act, such as, for example, an

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[7] 15 U.S.C. § 1.

[8] 15 U.S.C. § 45.

[9] See FTC v. Cement Institute, 333 U.S. 676, 684-86 (1948), citing Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941); FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52 (1927).

invitation to collude that is a preliminary step toward collusion but falls short of an agreement.

As it has been interpreted, the Sherman Act does not prohibit all agreements that restrain trade but only those that unreasonably restrain competition. Some conduct, such as agreements among competitors to fix prices, is presumptively unreasonable, and "[n]o elaborate study of the industry is needed to establish their illegality."[10] A judgment about the reasonableness of other conduct is based on an assessment of all the relevant facts and circumstances. This is in each case a highly fact-specific analysis, focusing on the competitive significance of the challenged activity. Relevant facts include the nature and effect of the challenged activity, the purpose of the actors and the structure of the industry.

We can see the rule against price fixing and the focus on competition in early trade association cases. The Trans-Missouri Freight Association case in 1897, for example, involved an explicit agreement among railroads that formed a trade association to fix rates and eliminate ruinous competition among them. This is one of the cases I alluded to a few minutes ago. The written agreement specified the purpose of the association to fix rates for "competitive" rail traffic on all routes located in a territory running from Mexico north to Montana and from the Kansas-Missouri border west to the Pacific, all of which is

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[10] National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).

described in great detail in the agreement.[11] The Government brought suit, alleging unlawful price fixing. The railroads offered, in defense of their agreement, a claim that the agreed-to price was reasonable. The Supreme Court said the argument "cannot be admitted . . . [c]ompetition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play."[12]

Lest you think this is ancient history, too obvious to bear repeating, let me remind you that a similar defense was asserted in FTC v. Superior Court Trial Lawyers Association,[13] a case decided by the Supreme Court in 1990. The case was an appeal from a Commission decision finding unlawful price fixing by an association of lawyers who provided criminal defense services to indigent defendants in the District of Columbia. The Supreme Court affirmed liability. Even assuming that the lawyers' cause -- higher pay for their services -- was worthwhile and that the pre-boycott rate for their services was unreasonably low, the Court said, citing the Trans-Missouri Freight case, "it 'is no excuse that the prices fixed are themselves reasonable.'"[14]

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[11] 166 U.S. at 293.

[12] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 339 (1897); see also United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) (price-fixing agreements may be held "unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed.").

[13] 107 F.T.C. 510 (1986); rev'd in part & remanded, 856 F.2d 226 (D.C. Cir. 1988); rev'd & remanded, 493 U.S. 411 (1990).

[14] 493 U.S. at 424 (quoting Trenton Potteries).

The purpose and likely effect of exchanges of information will be important in assessing their reasonableness, as can be seen if we look back once again to the early cases involving trade association information exchanges. For example, in the Hardwood case,[15] decided in 1921, the Supreme Court concluded that the exchange of information by the American Hardwood Manufacturers' Association was a "systematic effort . . . to cut down production and increase prices."[16] Unlawful purpose was inferred in part from the quantity and quality of information that the members shared through their association. "Genuine competitors," the Court said, "do not make daily, weekly and monthly reports of the minutest details of their business to their rivals,"[17] as did the members of the Hardwood association. As to the effects of the plan, the Court observed both that hardwood prices had increased "to an unprecedented extent" in 1919 and that "1919 was a year of high and increasing prices generally."[18]

A number of considerations that are important in modern antitrust analysis are lacking in the Hardwood case. We do not see, for example, any discussion by the majority of the potential benefits from information exchanges. Nor did the majority

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[15] American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

[16] Maple Flooring Manufacturers' Ass'n v. United States, 268 U.S. 563, 580 (1925).

[17] Id. at 410.

[18] Id. at 409.

discuss the structure of the industry or the market power (or lack of it) of the trade association and its members. Two of the dissenting justices, Justice Holmes and Justice Brandeis, commented on these aspects of the case.

Justice Holmes believed that the information exchange was important to the competitive process. "I should have thought," he said, "that the ideal of commerce was an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future on both sides."[19] Banning the information exchange, he said, would "exclud[e] mills in the backwoods from information [and] . . . enable centralized purchasers to take advantage of their ignorance of the facts."[20]

Justice Brandeis had similar concerns. He said that the information exchange "tend[ed] to promote all in competition which is desirable . . . [b]y substituting knowledge for ignorance, rumor, guess and suspicion, . . . research and reasoning for gambling and piracy, without closing the door to adventure or lessening the value of prophetic wisdom."[21] Justice Brandeis also concluded that refusing to allow the exchange of information "may result in suppressing competition in the hardwood industry."[22]

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[19] American Column & Lumber Co. v. United States, 257 U.S. 377, 412 (1921) (Holmes, J., dissenting).

[20] Id. at 413.

[21] American Column & Lumber Co. v. United States, 257 U.S. 377, 418 (1921) (Brandeis, J., dissenting).

[22] Id. at 418.

Three and a half years later, the Supreme Court decided Maple Flooring.[23] The Government appeared to have much better facts than in the Hardwood case for proving an unlawful agreement. Let us compare the two cases. The Maple Flooring Association had twenty-two members; the Hardwood Lumber Association had 365 members. Assuming an agreement is easier to achieve among a smaller number of participants, collusion appears more likely in the Maple Flooring case. The members of the Maple Flooring Association produced 70% to 75% of the maple, beech and birch flooring sold in the United States, a share that would appear to carry some power over price. The 365 members of the Hardwood Lumber Association had accounted for only about one-third of industry production, implying the availability of a larger amount of hardwood lumber to undercut the price agreement. Preliminarily, given the smaller number of firms and their larger combined market share, collusion would appear to be more easily accomplished by the maple flooring suppliers than by the hardwood lumbermen.[24]

Some of the statistics that the Maple Flooring Association disseminated, such as freight rates from Cadillac, Michigan, to between 5000 and 6000 points of shipments in the United States, appear more competitively suspicious than those disseminated by

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[23] Maple Flooring Ass'n v. United States, 268 U.S. 563 (1925).

[24] See U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines ¶¶ 2-2.12 (April 2, 1992) (discussion of conditions conducive to collusion, including number of firms and industry concentration).

the Hardwood Association, and the details reported by the members to the association appear to have been at least as "minute" as those described in the Hardwood case. Yet the Court found no violation of the Sherman Act. The case has been criticized. Then professor, now Judge Posner has written that "[a]n inference of collusion fairly leaps out of the facts recited in the Court's opinion."[25]

My purpose in discussing the Maple Flooring case is not to second guess the Court or Judge Posner. The case is relevant to our subject today because of the Court's recognition of the potential competitive benefits of information exchanges. On the minus side, the information gathered may be the basis for an unlawful arrangement,[26] the Court said, and it was "not open to question that the dissemination of pertinent information . . . tends to . . . produce uniformity of price and trade practice."[27] On the plus side, the Court said, "[c]ompetition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction."[28] The Court cited the "consensus of opinion of economists and of many of the most important agencies

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[25] R.A. Posner, Antitrust Law: An Economic Perspective 142 (1976).

[26] 268 U.S. at 563.

[27] Id. at 582.

[28] 268 U.S. at 583.

of Government that the public interest is served by the gathering and dissemination, in the widest possible manner" of industry statistics concerning price, production and distribution, "because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid waste which inevitably attends the unintelligent conduct of economic enterprise."[29]

Almost seventy years later, Maple Flooring remains a useful reference in analyzing information exchanges and trade associations. There is the potential for harm to competition, but there also is the potential for benefits to competition. The problem in each case is figuring out what the competitive effects will be. Now let me turn to particular types of information exchanges and how to reduce some of the risk of antitrust scrutiny.

It bears repeating that price is the most sensitive competitive variable, but price surveys can be and often are undertaken without exposing an association or its members to antitrust liability. The principal concern in conducting a price survey should be insulating the members from direct price exchanges and an inference of an agreement on price.

Price surveys are less likely to raise concerns under the antitrust laws if they are conducted by an independent third

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[29] Id.

party rather than by industry members.[30] A direct exchange of pricing information between competitors poses greater risks, because there is greater opportunity for an unlawful agreement on price.[31] Gathering the information through an independent third party can insulate the members from such direct exchanges. If officials of a trade association undertake the survey, some internal safeguards may be in order to protect against the implication that the association is acting as a conduit to transmit sensitive commercial data among the members.

A survey of historical prices is likely to be less risky than an exchange of current pricing information. Information about recent or proposed transaction prices could be a means for industry members to converge on particular price levels or to send signals about intended price levels, laying the groundwork for collusive pricing.[32] That was one of the violations alleged in the Airline Tariff Publishing case,[33] a case brought by the Department of Justice against eight domestic airlines and the Tariff Publishing Company ("ATP"), the computerized reservation system. The complaint alleged that the airlines used the ATP to

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[30] See U.S. Department of Justice & Federal Trade Commission Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, Sept. 27, 1994, at 55.

[31] See Container Corporation of America v. United States, 393 U.S. 333 (1969).

[32] An assumption that historical prices cannot fix prices for the future may be unwarranted in a particular case. See R.A. Posner, Antitrust Law: An Economic Perspective 137 (1976).

[33] See U.S. v. Airline Tariff Publishing Co., 836 F. Supp. 9 (D.D.C. 1993) (proposed consent found to be in public interest).

fix air fares and to coordinate fare changes, raising prices for consumers. For example, the first and last ticket dates for promotional fares allegedly were placed on the ATP by the airlines to negotiate prices with their competitors. The Department of Justice obtained consent agreements with the airlines to halt the practice.

A survey will present less antitrust risk if the information distributed to the members is aggregated so that individual firm data are not readily identifiable. The publication of disaggregated data resembles a direct exchange of pricing information among competitors, especially if the data can readily be attributed to particular firms.

It is also a good idea to be cautious in collecting and disseminating information about terms of sale other than price, because price in the antitrust context means more than dollars and cents. It also reaches other price-related terms of sale, such as credit terms, that can affect the quality-adjusted price of goods and services. Hours of service can also be a sensitive area.

For example, an agreement by an association of automobile dealers in Detroit to restrict the hours during which they were open for business was challenged by the Commission in the Detroit Auto Dealers Association case.[34] The dealers agreed that they would not open their showrooms on Saturdays and several evenings

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[34] Detroit Auto Dealers Ass'n, Inc., 111 F.T.C. 417 (1989), aff'd in part, rev'd in part & remanded, 955 F.2d 457 (6th Cir.); cert. denied, 113 S. Ct. 461 (1992).

a week. The Commission concluded that the agreement restricted competition by cutting down consumer shopping opportunities and the resulting downward pressure on prices. The court of appeals did not entirely endorse the Commission's analysis but did find that the restriction on showroom hours was an unreasonable restraint of trade. The case is now pending on remand to the Commission from the court for consideration of issues relating to relief, so I will not discuss it further.

Advertising is another aspect of competition that is closely related to price. Consumers rely on advertising to identify the best quality-adjusted price, that is, the best price for a given quality, which includes elements of product performance and service. When advertising is restricted, by, for example, a trade association ethical rule, comparison shopping is inhibited and consumer pressure on prices is reduced. In the American Medical Association[35] and Massachusetts Board of Registration in Optometry[36] cases, the Commission concluded that restraints on advertising are inherently likely to reduce competition.

The Commission also has accepted several consent orders to settle charges that restraints on advertising by trade associations adversely affected competition. In Personal Protective Armor Association,[37] the Commission alleged that a

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[35] 94 F.T.C. 701, 1005 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 445 U.S. 676 (1982).

[36] 110 F.T.C. 549, 604-07 (1988).

[37] Docket C-3481 (March 17, 1994).

trade association of manufacturers of bulletproof vests had restrained competition by maintaining ethical rules against comparative advertising about product quality and the use of product liability insurance as an incentive for purchases. The Association's policy against comparative advertising would tend to make informed purchasing decisions more difficult.

One of the Commission's most newsworthy recent cases involved an information exchange. The exchange of information during the process of drafting an industry code was challenged by the Commission in a case involving the Infant Formula Council, a trade association of makers of infant formula.[38] In the 1970's, consumer groups protested direct-to-consumer advertising of infant formula, claiming that some consumers, especially in developing countries, were induced to their detriment to substitute manufactured infant formula for breast milk. The World Health Organization adopted a model code barring direct-to-consumer advertising, and there were calls in the United States for congressional action barring direct advertising of infant formula.

In this context, the members of the Infant Formula Council, including Abbott Labs, which had more than 50% of the U.S. infant formula market in 1990, met to discuss the development of an industry code for advertising. One purpose of the proposed code was to defuse public criticism of the industry. Not surprisingly, in connection with drafting the code, the infant

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[38] Abbott Laboratories, Docket 9253 (Feb. 4, 1994).

formula manufacturers revealed some information about the marketing practices that they would prefer to use. Abbott Labs indicated a preference for so-called "ethical advertising," which consisted of promoting infant formula indirectly through health care professionals. The Commission alleged that this communication about marketing preference reduced uncertainty about Abbott's future advertising practices, thereby facilitating avoidance of competitive advertising. The complaint also alleged an unlawful agreement among the infant formula manufacturers to restrict direct-to-consumer advertising. I should note that I supported the order only insofar as it was based on the conspiracy theory.

In yet another recent case, an association of engineering firms used a peer review program as a vehicle to review its members' fee schedules, competitive bidding practices and credit practices.[39] The members of the association also exchanged financial information, including data about prices, salaries and contracts. The association agreed to a consent order to settle the allegations that its peer review program and information exchanges, along with other practices, constituted an unlawful agreement to restrain competitive bidding and the granting of favorable credit terms.

Information exchanges other than price surveys are analyzed under the same principles. In general, an exchange of

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[39] ASFE, The Association of Engineering Firms Practicing in the Geosciences, Docket C-3430 (June 11, 1993).

information that is related to the variables on which firms compete will be of interest to the antitrust agencies. Following the principles set forth in Maple Flooring and other cases, the mere exchange of information is likely to be beneficial. An exchange of information that leads to or facilitates an express or tacit agreement on terms, however, is likely to elicit enforcement action. The exchange of production data generally is viewed as procompetitive; an agreement to restrict production is likely to affect competition adversely.

Market structure is likely to be relevant, because a collusive agreement is more easily achieved and maintained in an industry having a small number of producers. An anticompetitive agreement is less likely in an unconcentrated industry, because it is more difficult for a larger number of firms to reach a consensus. An agreement also may be more difficult to police when the number of sellers is large. Other considerations also are relevant. For example, an anticompetitive consensus is likely to be easier to achieve when the product is fungible and there are fewer competitive variables on which firms must agree. Collusion also is easier to maintain when consumer demand for the product is inelastic, that is, consumers cannot avoid higher prices by buying a different product or by forgoing purchases.

Finally, let me return to benchmarking. Benchmarking can be highly structured or entirely informal. It might be implemented through plant visits, seminars, casual conversations, or

executive or other personal contacts.[40] Industry and business publications, reporting on new practices and identifying successful innovators, can be a source for benchmarking. Recently, for example, we have seen articles about the advantages of "horizontal" and "modular" management organization to streamline vertically integrated, bureaucratic corporations.[41]

As I have defined benchmarking -- examining an aspect of the business of another to evaluate and improve one's own business -- the term could be used in connection with the joint venture that General Motors and Toyota initiated in the 1980's that builds Chevrolet Geo Prizms and Toyota Corollas at a plant in California. One of GM's goals for the joint venture was to learn from Toyota efficient Japanese manufacturing and management techniques.[42] In 1993, in connection with extending the life of the venture beyond the ten years originally contemplated, GM

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[40] See, e.g., Swoboda & Brown, "Power Connection: GE's Guiding Light Helps GM Retool," The Wash. Post, April 3, 1994, at H-1, col. 1 ("This need for corporate outreach [to keep up with the best business practices] helps explain the parade of CEOs to GE's Fairfield, Conn., headquarters to consult with [GE Chairman John F. Welch, Jr.,] an executive who has been through the restructuring wars and prospered.").

[41] E.g., Tully, "The Modular Corporation," Fortune, Feb. 8, 1993, at 106 ("In a leap of industrial evolution, many companies are shunning vertical integration for a lean, nimble structure centered on what they do best.").

[42] See Statement of Chairman Miller in General Motors Corp., 103 F.T.C. 374, 388 (1984).

reported that it was continuing to reap the benefits of first-hand experience with an efficient production system.[43]

Benchmarking, like any other exchange of information, offers competitive benefits but also has the potential for reducing competition. The Commission's approach to the GM/Toyota joint venture is illustrative: The same commissioners who foresaw benefits from the joint venture also supported a complaint alleging that the joint venture could lessen competition.[44] The Commission's order, entered with the consent of GM and Toyota, permitted the joint venture to go forward but imposed restrictions designed to prevent anticompetitive effects.[45] One restriction limited the information that GM and Toyota would be permitted to exchange.

If you are benchmarking with competitors, there are several other case initiatives of which you should be aware. These are cases involving invitations to collude, which the Commission has challenged under the FTC Act as unfair methods of competition. An unlawful invitation to collude is an invitation to a competitor to fix prices. The theory of violation does not

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[43] See Order Granting Petition To Reopen and Set Aside Order in General Motors Corp., Docket C-3132, at 10 & note 31 (Oct. 9, 1993).

[44] See Statement of Chairman Miller, Statement of Commissioner Douglas and Statement of Commissioner Calvani in General Motors Corp., 103 F.T.C. at 386, 397 & 399.

[45] The Commission's order limited the scope of the joint venture (in terms of the number of automobiles produced and the duration of the joint venture) and restricted the exchange of information between GM and Toyota.

depend on an agreement on price. Instead, the unilateral invitation to collude on price poses an unambiguous danger to competition and lacks procompetitive justification. It may be prudent to structure benchmarking initiatives to competitors with this theory of liability in mind. For example, it might be more prudent to ask a competitor how a particular production process works than to ask how the competitor keeps its selling prices so low.[46]

Benchmarking among competitors may offer greater prospect for efficiencies, but the opportunities for anticompetitive agreement also would be increased. Benchmarking with firms that are not competitors is less likely to attract antitrust scrutiny. A firm that does benchmark with a competitor might want to consider in advance the incentives that the competitor might have for cooperating. It would be advisable to avoid a situation in which the quid pro quo appears to be an agreement on terms of competition.

If a firm does collaborate with a competitor, both the structure of the industry and the availability of non-competitors with which to benchmark would be relevant. The importance of industry structure is fairly obvious: we would be most concerned about benchmarking between competitors who are industry leaders in a market with few competitors. This concern was reflected in

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[46] See Quality Trailer Products Corp., Docket C-3403 (Nov. 5, 1992) (Quality Trailer representatives allegedly told competitor that its prices were too low and invited agreement on price).

the GM/Toyota order. In 1984, when the order was issued, the Commission was concerned that a joint venture could lessen competition. In 1993, the Commission concluded that entry and expansion in the automobile industry made the exercise of market power by the parties to the joint venture unlikely.[47]

The relevance of the availability of non-competitors is a bit more complex. If firms that are not competitors offer comparable benchmarking opportunities, the choice to collaborate with a competitor may suggest an anticompetitive purpose. On the other hand, depending on the process to be benchmarked, a competitor may be the only or the most useful source.

Certain types of information are particularly risky for benchmarking. The closer benchmarking comes to core competitive concerns like pricing, the greater scrutiny it is likely to receive. Costs and marketing strategies fall in this category, too.

For any benchmarking process, a planned, structured approach may be advisable. The process can be focused on the area of interest and away from areas that might raise competitive concerns. It could be useful in some situations if the participants kept records of their discussions, which could provide an important evidentiary record if questions did arise. The Commission's order in GM/Toyota identified specific areas in which communications between the companies would be of

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[47] General Motors Corp., Docket C-3132, Order Granting Petition To Reopen and Set Aside Order 9 (Oct. 29, 1993).

competitive concern, and the order may be useful for identifying the areas in which caution would be particularly appropriate when benchmarking with a competitor. Careful antitrust compliance programs have served the trade associations represented here well, and those programs should be extended if they have not been already to include benchmarking. This is an area in which the ongoing involvement of counsel is appropriate.

Let me conclude this one-way provision of information by inviting you to make this a two-way exchange. I invite your comments and your questions. In short, I encourage you to exchange information with me freely but suggest that you continue to exercise caution before you exchange information with your competitors. Thank you.

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